Supreme Court, U.S.
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No. 10-___

10-130

IN THE

Supreme Court of the United States

ZHAN GAO,

Petitioner,

v.

ERIC HOLDER, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A non-citizen is ineligible for withholding of removal under 8 U.S.C. § 1231(b)(3)(B)(ii) or asylum under 8 U.S.C. § 1158(b)(2)(A)(ii) if the Attorney General determines that the individual has been convicted of "a particularly serious crime" and constitutes "a danger to the community." With respect to withholding of removal, an "aggravated felony . . . for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years" constitutes a "particularly serious crime," but the Attorney General may waive the five-year requirement. *Id.* § 1231(b)(3)(B). With respect to asylum, an "aggravated felony" is "a particularly serious crime"; moreover, the Attorney General may also "designate" additional offenses "by regulation." *Id.* § 1158(b)(2)(B)(ii).

The questions presented are:

1. Is the category of "particularly serious crimes" limited to "aggravated felonies," with the sole exception that – with respect to asylum – the Attorney General may "designate" additional offenses "by regulation"? (This Court granted certiorari to resolve the circuit conflict over whether, for purposes of withholding of removal, "particularly serious crimes" are limited to "aggravated felonies" in *Ali v. Achim*, 551 U.S. 1188 (2007), but that case was voluntarily dismissed by the parties before a ruling on the merits, 552 U.S. 1085 (2007).)

2. Must the government make an individualized determination that an individual poses "a danger to the community" before denying her withholding of removal or asylum under 8 U.S.C. § 1231(b)(3)(B) (for

withholding) or 8 U.S.C. § 1158(b)(2)(A)(ii) (for asylum)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Zhan Gao respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals denying the petition for rehearing and rehearing en banc (Pet. App. 1a) is unpublished. The panel decision (Pet. App. 2a-18a) is reported at 595 F.3d 549. The opinions of the Board of Immigration Appeals (Pet. App. 19a-46a) are unpublished. The relevant opinions of the Immigration Judge (Pet. App. 47a-151a) are unpublished.

JURISDICTION

The opinion and judgment of the court of appeals were filed on February 23, 2010. The order denying petitioner's timely petition for rehearing en banc was entered on April 23, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 1231 of Title 8 of the United States Code provides in relevant part:

(b) Countries to which aliens may be removed

. . . .

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that –

. . .

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States

. . .

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.

Section 1158 of Title 8 of the United States Code provides in relevant part:

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A) of this title.

. . . .

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that –

. . .

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States

. . . .

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a

crime described in clause (ii) or (iii) of subparagraph (A).

STATEMENT OF THE CASE

An immigration judge granted petitioner, a Chinese national, withholding from removal and asylum. The Board of Immigration Appeals (BIA) and the Fourth Circuit, however, held that she was ineligible to remain in the United States because her conviction for violating U.S. export laws constituted a "particularly serious crime" under federal law notwithstanding that export violations do not qualify as "aggravated felonies." This Court previously granted certiorari to resolve the circuit conflict over the question whether crimes that are not aggravated felonies can constitute "particularly serious crimes" for purposes of withholding of removal, in *Ali v. Achim*, 551 U.S. 1188 (2007), but the parties resolved the case, 552 U.S. 1085 (2007).

Moreover, the BIA and the Fourth Circuit also held that a conviction alone stripped an individual of eligibility for withholding of removal or asylum without regard to whether the individual poses a danger to the community. This conclusion conflicts with both the plain text of the statute and with the decisions of courts in other countries that have considered the question.

1. **Statutory Framework.**

a. Withholding of Removal. The government may not remove a non-citizen to another country if she can show that it is "more likely than not" that her "life or freedom would be threatened in such country" because of her "race, religion, nationality, membership in a particular social group, or political

opinion." *INS v. Stevic*, 467 U.S. 407, 411, 429-30 (1984).[1] However, the remedy is not available if the Attorney General determines that the non-citizen, "having been convicted by a final judgment of a particularly serious crime is a danger to the community." 8 U.S.C. § 1231(b)(3)(B)(ii). Congress defined "particularly serious crime" as follows:

> [A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.

8 U.S.C. § 1231(b)(3)(B).

Federal law defines an "aggravated felony" to include a broad array of offenses, such as murder, rape, drug trafficking, weapons trafficking, racketeering, running a prostitution business, and burglary. 8 U.S.C. § 1101(a)(43).

The position of the BIA – based on what it regards as "a plain reading of the Act" – is that "the statute does not require an offense to be an aggravated felony in order for it to be considered a

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[1] The non-citizen may, however, be removed to a third country in which she will not face persecution. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999).

particularly serious crime." *In re N-A-M-*, 24 I. & N. Dec. 336, 338 (2007). Further, in the view of the BIA, the Attorney General need not make an individualized determination that the non-citizen in fact represents a "danger to the community"; instead, she may rely on a categorical judgment about certain categories of crimes. *Id.* at 342.

b. Asylum. A non-citizen may also pursue the broader remedy of asylum, which prohibits the individual's removal to any country. Unlike withholding from removal, asylum is a discretionary, rather than mandatory, remedy. 8 U.S.C. § 1158(b)(1)(A).

A non-citizen is eligible for asylum if she can show either that she has in the past been persecuted on account of a protected ground – such as race, religion, nationality, membership in a particular social group, or political opinion – or that she has a "well-founded fear" of future persecution. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A). As with withholding of removal, a non-citizen is ineligible for asylum if the Attorney General determines that she, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." 8 U.S.C. § 1158(b)(2)(A)(ii).

The asylum statute defines "particularly serious crimes" more broadly than the statute governing withholding of removal: a non-citizen who has "been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." *Id.* § 1158(b)(2)(B)(i). Further, the Attorney General may "designate by regulation offenses that will be considered to be a [particularly serious] crime." *Id.* § 1158(b)(2)(B)(ii).

2. Factual Background. Petitioner Zhan Gao was born in the People's Republic of China and became a legal permanent resident of the United States in 1993. In 2001, Gao traveled to China with her husband and young son. As the family prepared to leave China in February 2001, Gao was detained by Chinese authorities, who held her under harsh conditions and interrogated her repeatedly for long periods of time for several months. In June 2001, she stood trial on charges that she had "spied" for Taiwan by taking three documents designated as "internal" out of China. Pet. App. 4a. Gao's trial – which the State Department has characterized as "notably lacking in due process," *id.* 75a – lasted just three hours, after which she was convicted and sentenced to ten years in prison, *id.* 62a-63a.

The Chinese government's treatment of Gao drew criticism from the U.S. government, with both President George W. Bush and Secretary of State Colin Powell speaking out on her behalf. Pet. App. 117a. Shortly after her conviction, Gao was released on "medical parole." *Id.* 4a. As a condition of her release, Gao was required to "sign a paper . . . stating that she would not speak to anybody about what had happened." *Id.* 62a. However, upon her return to the U.S., Gao made speeches and published articles critical of the Chinese government. *Id.*

Before Gao left for China, U.S. customs officials had received a complaint that she had been exporting computer equipment to China without a license. *See* Pet. App. 4a. Upon her return, Gao cooperated with the ensuing investigation, including by providing the government with information about others exporting illegally to China. *Id.* 5a, 65a.

In November 2003, Gao pleaded guilty to one count of tax fraud and one count of unlawful export of Commerce Control List items, Pet. App. 34a, arising out of her shipments to China of microprocessors that have both commercial and military uses, *id.* 113a.

At sentencing, U.S. District Judge T.S. Ellis found that Gao was entitled to a downward departure based on the substantial assistance that she had provided to the government. Pet. App. 122a. He sentenced her to seven months in prison and eight months of community confinement, *id.* 123a, which he delayed to allow her to nurse her infant son, *id.* 111a.

3. Immigration Proceedings. In 2005, after Gao completed her prison sentence, the Department of Homeland Security began proceedings to remove her from the United States. Immigration Judge Paul Wickham Schmidt found her removable on the ground that her export control and tax fraud convictions constituted crimes involving moral turpitude. Pet. App. 130a.

Judge Schmidt held, however, that petitioner was entitled to asylum, withholding of removal, and, alternatively, deferral of removal under the Convention Against Torture. Pet. App. 127a-28a. Judge Schmidt concluded that Gao's crimes were not "particularly serious crimes" that would disentitle her to withholding of removal or asylum because they were "closer to the types of non-violent 'white collar' crime that generally have been found not to be particularly serious than [they were] to the types of violent or potentially violent crimes against individuals or drug trafficking which generally have been found to be particularly serious." *Id.* 149a-50a.

Also before Judge Schmidt was a letter from Paul McNulty, who served as the U.S. Attorney for the Eastern District of Virginia at the time of Gao's conviction. Pet. App. 109a-10a. Mr. McNulty recommended that Gao be allowed to remain in the United States because she "provided 'substantial assistance' in the investigation of others who had committed crimes." Although his recommendation was not binding, Mr. McNulty nevertheless "entreat[ed] the DHS not to deport [petitioner.]" *Id.* 110a. The FBI also wrote a confidential letter regarding Gao's cooperation that was given to Mr. McNulty, who transmitted it to Judge Ellis. *Id.* 122a.

Relying in part on Mr. McNulty's letter, Pet. App. 109-10a, Judge Schmidt concluded that "the public interest would best be served by giving the respondent a chance to make good on her promise to redeem herself and live a worthy future life. I believe that [she] can and will achieve this potential." *Id.* 100a-01a. Judge Schmidt reasoned that Gao – whose husband and three young children are all U.S. citizens, *id.* 100a – had "learned her lesson" and "now seeks to enter the United States exclusively to care for her family and to support herself and her family through honest work," *id.* 128a. He further found that "there is not a reasonable possibility that [Gao] will resume her unlawful trade activities." *Id.*

The Department of Homeland Security appealed Judge Schmidt's determinations that Gao was eligible for asylum and withholding of removal to the Board of Immigration Appeals (BIA). The BIA reversed. It deemed Gao to be barred from asylum and withholding as a matter of law because her unlawful export conviction was a "particularly

serious crime." *See* Pet. App. 43a. The BIA initially agreed with Judge Schmidt "that an unlawful export conviction is not presumptively a particularly serious crime." *Id.* 40a. However, following its practice of determining whether a conviction is a particularly serious crime "on a case-by-case basis," it nonetheless concluded that "the national security implications of the respondent's offense render it a particularly serious crime." *Id.*

Instead of considering the full range of evidence relevant to whether Gao posed a danger to the community in the future, the BIA concluded that "the conviction itself is the sole determinative factor for whether an alien represents a 'danger to the community.'" Pet. App. 43a. The BIA explained that Judge Schmidt should not have considered the specific facts relevant to Gao's risk of recidivism – for example, that she was no longer operating her export business – because as a matter of law such considerations "ha[ve] no bearing on the question of whether she is a danger to the community for purposes of the Act." *Id.*

Gao filed a motion to reconsider, challenging the BIA's determination that her export conviction was a particularly serious crime barring her from asylum and withholding. In September 2007, the BIA issued an opinion rejecting Gao's arguments.[2]

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[2] For its part, DHS did not appeal Judge Schmidt's ruling that Gao is entitled to deferral of removal under the Convention Against Torture, and that ruling is not at issue here. Pet. App. 7a. DHS did successfully seek reconsideration of the BIA's ruling on a separate question: the BIA's finding that Gao was

4. Petition for Review. Gao sought review of the BIA's decision in the Fourth Circuit, which affirmed the BIA's ruling that she was not eligible for either withholding or asylum. Pet. App. 3a. The court of appeals rejected Gao's argument that, for purposes of withholding of removal, the universe of "particularly serious crimes" is limited to "aggravated felon[ies]" – a category that would exclude her export control conviction. *Id.* The panel concluded that BIA's contrary view represents a reasonable interpretation of an ambiguous statute, which is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court of appeals reasoned that "[t]he statute does not declare that some categories of crimes may not be considered particularly serious. Instead, it creates a per se rule that some aggravated felonies must be considered particularly serious and then leaves it up to the Attorney General to 'decide[]' whether other crimes are as well." Pet. App. 10a-11a.

The panel next turned to, and rejected, Gao's related argument that, for purposes of asylum, "particularly serious crimes" are limited to aggravated felonies and the further list of offenses that the Attorney General has "designate[d]" as particularly serious "by regulation." 8 U.S.C. § 1158(b)(2)(B)(ii). The panel opined that "nothing in the statute says that the Attorney General must use

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not inadmissible because she was not seeking to enter the United States to engage in illegal exports. *Id.* 6a. The Fourth Circuit declined to decide this issue, *id.* 17a-18a, which would remain open on remand if Gao were to prevail in this Court.

regulation to designate crimes as particularly serious"; rather, it reasoned, because the word "may" is a permissive verb, Pet. App. 14a, the statute simply authorizes the Attorney General to designate other, non-aggravated felonies as "particularly serious" by regulation if he so chooses, *id.*

Finally, the panel rejected Gao's argument that the Board erred in treating her as statutorily barred from withholding of removal and asylum without first determining, on the facts of her case, that she constitutes a danger to the community. Pet. App. 12a n.1. The panel deemed it "well settled in this circuit that 'once the particularly serious crime determination is made, the alien is ineligible for withholding without a separate finding on dangerousness.'" *Id.* (quoting *Kofa v. INS*, 60 F.3d 1084, 1088 (4th Cir. 1995) (en banc)).

Gao's petition for rehearing en banc was denied. Pet. App. 1a. This petition follows.

REASONS FOR GRANTING THE WRIT

I. Certiorari Is Warranted To Determine The Scope Of "Particularly Serious Crimes" That Render A Non-Citizen Ineligible For Withholding Of Removal And Asylum.

A. This Court Should Take This Opportunity To Resolve The Question On Which It Granted Certiorari In *Ali*.

Congress provided that a non-citizen is ineligible for withholding of removal if the Attorney General determines that the individual, "having been convicted by a final judgment of a particularly

serious crime is a danger to the community." 8 U.S.C. § 1231(b)(3)(B)(ii). Congress specified that

> an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.

8 U.S.C. § 1231(b)(3)(B)(iv).

There is a widely acknowledged circuit split over whether the statute limits the category of "particularly serious crimes" to "aggravated felonies." This Court granted certiorari in *Ali v. Achim*, 551 U.S. 1188 (2007), to resolve that conflict but was unable to decide the question after the parties voluntarily withdrew that case. Certiorari is warranted to decide that question here.

1. The Courts Of Appeals Remain Irreconcilably Divided.

As the Attorney General acknowledged in his brief below, the circuits are divided on this important question. *See* Resp. C.A. Br. 29-30 (citing *Alaka v. Attorney General*, 456 F.3d 88 (3d Cir. 2006), as "reaching a contrary result" from *Ali*).

a. The Fourth Circuit joined four other courts of appeals in holding that that, for purposes of withholding of removal, the category of "particularly

serious crimes" is not limited to aggravated felonies. But although they reach the bottom line favored by the BIA, these circuits reject the BIA's view that its position is compelled by the plain language of the statute. Instead, these courts regard the statutory language as ambiguous and defer to the agency's interpretation. *See* Pet. App. 9a-10a; *N-A-M v. Holder*, 587 F.3d 1052, 1056 (10th Cir. 2009);[3] *Delgado v. Holder*, 563 F.3d 863, 867 (9th Cir. 2009); *Nethagani v. Mukasey*, 532 F.3d 150, 156-57 (2d Cir. 2008); *Ali v. Achim*, 468 F.3d 462, 470 (7th Cir. 2006).

2. By contrast, in the Third Circuit, petitioner's export control conviction would not constitute a particularly serious crime for purposes of withholding of removal. In *Alaka*, that court held that "[t]he plain language and structure (i.e., context) of the statute indicate that an offense must be an aggravated felony to be sufficiently 'serious.'" 456 F.3d at 104.

In reaching its decision, the Third Circuit relied on a close textual analysis of the definitional paragraph of Section 1231(b)(3)(B). "The second sentence" of that section – which permits the Attorney General to designate aggravated felonies giving rise to prison terms of less than five years as "particularly serious crimes" – "explicitly" is "tied to the first." 456 F.3d at 104. Because the first sentence includes only aggravated felonies in its

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[3] On June 21, 2010, Justice Sotomayor extended the time for N-A-M to file a petition for certiorari to and including July 29, 2010. App. 09A1233. On July 9, 2010, Justice Sotomayor stayed N-A-M's removal pending the filing and disposition of her petition. App. 10A16.

definition of particularly serious crimes, the Attorney General's authority to designate crimes as "particularly serious" must also be "limited to aggravated felonies." *Id.* at 104-05.

3. This Court's intervention is required because the conflict is entrenched. Although its opinion predated the BIA's decision in *N-A-M-*, there is no reason to believe that the Third Circuit will reverse course. The Third Circuit did not find any ambiguity in the statute. Rather, it determined that the "plain language and structure" of the statute compelled its decision. This reasoning precludes the Third Circuit from deferring to the BIA's decision in *N-A-M-*. *Cf. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter.").

Two recent decisions of the Third Circuit reinforce that conclusion by treating *Alaka* as good law. *See Quiceno v. Attorney Gen. of the United States*, 304 Fed. Appx. 40, 43 (3d Cir. 2008) ("In the withholding of removal context, a particularly serious crime is an aggravated felony for which the alien was sentenced to five years imprisonment or an aggravated felony that the Attorney General deems a particularly serious crime." (citing *Alaka*)); *Hussein v. Attorney Gen. of the United States*, 273 Fed. Appx. 147, 152 (3d Cir. 2008) ("In *Alaka*, 456 F.3d at 104-05, we held that an offense must be an aggravated felony to be considered a 'particularly serious' crime . . . .").

The five circuits on the other side of the conflict are equally intractable: in holding that "particularly

serious crimes" are not limited to aggravated felonies, four expressly acknowledged the Third Circuit's contrary holding in *Alaka*. *See* Pet. App. 10a; *N-A-M*, 587 F.3d at 1056; *Delgado*, 563 F.3d at 867; *Nethagani*, 532 F.3d at 156. There is no prospect that the division will resolve itself, as three circuits have denied rehearing en banc. *See* Pet. App. 1a; *N-A-M v. Holder*, Nos. 07-9580 and 08-9527 (10th Cir. Mar. 31 2010) (order denying rehearing en banc); *Ali v. Achim*, 2007 U.S. App. LEXIS 642 (7th Cir. Jan. 5, 2007) (en banc).

2. The Withholding Statute Limits Particularly Serious Crimes To Aggravated Felonies.

Only the Third Circuit's interpretation of the definition of aggravated felony properly accounts for the unambiguous language of the withholding provision, the structure of the statute as a whole, and Congress's intent. Moreover, interpreting "particularly serious crimes" as limited to aggravated felonies best comports with the interpretative framework of the immigration rule of lenity and the *Charming Betsy* canon. Finally, because the text of the statute is clear, the BIA's contrary decision in *In re N-A-M-*, 24 I. & N. Dec. 336, 337 (2007), is not entitled to deference.

1. The definitional paragraph of the statutory provision governing withholding of removal provides:

> [A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous

> sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.

8 U.S.C. § 1231(b)(3)(B)(iv).

Properly understood, Congress both specified a default category of specified crimes (aggravated felonies that gave rise to a prison term of at least five years) and provided a carefully defined authority for the Attorney General to expand that category (by waiving the five-year requirement). Congress notably did *not* authorize the Attorney General to take the far more significant step of waiving the requirement that the non-citizen have been convicted of an "aggravated felony" in the first place.

Under the canon of *expressio unius est exclusio alterius*, "expressing one item of [an] associated group or series excludes another left unmentioned." *United States v. Vonn*, 535 U.S. 55, 65 (2002). Moreover, the definitional paragraph must "be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009). Reading the statute to permit the Attorney General to designate any crime as particularly serious, even if it was not an aggravated felony, would strip the statute's "notwithstanding the length of the sentence imposed" clause of all meaning.

The same conclusion follows by contrasting the just-discussed definition of "particularly serious crime" in the statutory provision governing withholding of removal with the definition of the

same term in the parallel provision governing asylum. With respect to asylum, Congress not only designated aggravated felonies as particularly serious crimes (as with respect to withholding), but it also expressly granted the Attorney General the power to designate additional offenses as "particularly serious" by regulation. 8 U.S.C. § 1158(b)(2)(B)(ii). That stark contrast is telling: because the statutory provision governing withholding omits the explicit authority to specify additional particularly serious crimes that is given to the Attorney General for cases involving asylum, the withholding provision cannot fairly be read to provide that sweeping authority implicitly. Not only is it a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), but it is "generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another," *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994) (internal quotation marks omitted).

2. Restricting the definition of "particularly serious crime" to "aggravated felonies" is also compelled by Congress's purpose in enacting the provisions governing withholding of removal. Congress initially enacted those provisions in the Refugee Act of 1980[4] – which amended the

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[4] This change was originally codified at 8 U.S.C. § 1253(h), and was later renumbered as 8 U.S.C. § 1231(b)(3)(A).

Immigration and Nationality Act – to "bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). To that end, it enacted the "particularly serious crime" exception to the withholding statute, specifying that this exception in particular was "based directly upon the language of the Protocol" and should be "construed consistent with" it. H.R. Rep. No. 96-781, at 20 (1980). The BIA itself recognized that even Congress's more recent adoption of the amended definition of "particularly serious crime" reflects a determination "to ensure that the refoulement [*i.e.*, return] of a particular criminal alien would not place our compliance with the Protocol in jeopardy." *In re Q-T-M-T-*, 21 I. & N. Dec. 639, 648 (1996). *Cf. Moskal v. United States*, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting) ("If a word is obviously transplanted from another legal source . . . it brings its own soil with it.") (internal citation omitted).

It is accordingly significant that the Protocol limits "particularly serious crimes" to truly heinous offenses. For purposes of withholding of removal ("non-refoulement" in the terminology of the Protocol), a "serious" crime "must be a capital crime or a very grave punishable act." UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 155, U.N. Doc. HCR/1P/4/Eng/Rev.2 (1979) (re-edited 1992); *see also Cardoza-Fonseca*, 480 U.S. at 439 n.22 ("[T]he Handbook provides significant guidance in construing the Protocol."). As the BIA itself has

acknowledged, a "*particularly* serious crime" *ipso facto* must be "more serious" than a capital crime or a very grave punishable act. *Matter of Frentescu*, 18 I. & N. Dec. 244, 247 (1982) (emphasis added).

Even had Congress not plainly expressed, in both the text and history of the statute, its intention to comply with the 1967 Refugee Protocol, the *Charming Betsy* canon (*see Murray v. The Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64 (1804) (U.S. statutes should be construed so as not to violate international law if any other construction is possible)) would require courts to construe the statute consistently with the Protocol because "[b]oth the Refugee Convention and the Protocol serve as evidence of customary international law." Marra Guttenplan, *Granting Asylum to Persecuted Afghan Western Women*, 12 Cardozo J. L. & Gender 391, 393 n.17 (Fall 2005); *see also* Alex O. Canizares, *Is Charming Betsy Losing Her Charm? Interpreting U.S. Statutes Consistently With International Trade Agreements and the* Chevron *Doctrine*, 20 Emory Int'l L. Rev. 591, 609-11 (Fall 2006) (using *Cardoza-Fonseca*'s analysis of the Protocol as evidence "that *Chevron* is limited by *Charming Betsy*"). Similarly, courts must also construe statutes to avoid violating treaties, like the Protocol, to which the U.S. is a party. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) ("'A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.' *Cook v. United States*, 288 U.S. 102, 120 (1933).").

The restrictive interpretation of "particularly serious crime" adopted by the Third Circuit finds

additional support in the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449; *see also INS v. Errico*, 385 U.S. 214, 225 (1966). In the immigration context, a non-citizen should be clearly on notice that her actions will lead to deportation. *See James v. United States*, 550 U.S. 192, 219 (2007) (noting that "[t]he rule of lenity" is "grounded in part on the need to give 'fair warning' of what is encompassed by a criminal statute" (internal quotations omitted)).

This principle has special force here. The government's position in this case is that the Attorney General may declare any non-citizen ineligible for asylum and withholding of removal if she has committed *any* crime, even if the immigration laws do not reference that crime and the Attorney General has never before taken the position that the offense in question implicates withholding of removal or asylum.

Notice of deportation consequences is especially important in cases – such as petitioner's – involving a plea bargain. As this Court recently acknowledged in *Padilla v. Kentucky*, for many non-citizens facing criminal charges, "preserving the [] right to remain in the United States may be more important to the client than any potential jail sentence." 130 S. Ct. 1473, 1483 (2010) (citing *INS v. St. Cyr*, 533 U.S. 289, 296 (2001)). Thus, both non-citizens and prosecutors need to be aware of the immigration consequences of different crimes so that they can "reach [plea] agreements that better satisfy the interests of both parties." *Id.* at 1486.

4. The Fourth Circuit's contrary decision cannot be sustained on the basis that BIA's decision in *N-A-M-* warrants *Chevron* deference. First, because here "the intent of Congress is clear, that is the end of the matter." *Chevron*, 467 U.S. at 842. As this Court has already explained with respect to BIA interpretations, "[w]e only defer . . . to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous." *St. Cyr*, 533 U.S. at 320 n.45 (internal citations omitted). This principle extends to all of the normal canons – including the longstanding rule of immigration lenity, which this Court has invoked in two cases in which the BIA's interpretations were at issue. *See Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004); *Clark v. Martinez*, 543 U.S. 371, 380 (2005).

"Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. It authorized the Attorney General to determine that some crimes are particularly serious even if they do not carry a sentence of at least five years, but it restricted the universe of crimes that can qualify as particularly serious to aggravated felonies.

In *N-A-M-*, the BIA not only failed to address immigration lenity, the *expressio unius* canon, or the *Charming Betsy* doctrine, *see N-A-M-*, 24 I. & N. Dec. at 337, but it in fact regarded its holding as compelled by "a plain reading of the Act," *id.* at 338. When, as here, an agency believes that it is performing the interpretative function of adjudication – namely, applying clear text – it is not exercising the policy reasoning and discretion that ordinarily entitles its construction of an ambiguous statute to deference. *Peter Pan Bus Lines, Inc. v. Fed. Motor*

Carrier Safety Admin., 471 F.3d 1350, 1354 (D.C. Cir. 2006) ("[D]eference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress." (citing a long line of cases)); *see also Sec'y of Labor, Mine Safety and Health Admin. v. Nat'l Cement Co. of Cal., Inc.*, 494 F.3d 1066, 1073-75 (D.C. Cir. 2007); *cf. Negusie v. Holder*, 129 S. Ct. 1159, 1166-67 (2009) (holding that the BIA, in considering itself bound by the "plain language" of a statute and a court decision, "has not yet exercised its *Chevron* discretion"). Indeed, in "deferring" to such an agency interpretation, the court would necessarily be *disagreeing* with the agency's holding that the statute was clear. An agency cannot have it both ways.

B. This Court Should Also Resolve The Closely Related Question Of Under What Circumstances, If Any, The Commission Of A Crime Which Is Not An Aggravated Felony Can Render A Non-Citizen Ineligible For Asylum.

Certiorari should be granted to determine the scope of the term "particularly serious crime" with respect to asylum as well as withholding of removal. The statutory provision governing withholding of removal that this Court granted certiorari to address in *Ali* directly parallels the provision governing asylum. Both are rooted in an identical requirement that a non-citizen is ineligible for relief if the individual, "having been convicted by a final judgment of a particularly serious crime," is "a danger to the community." *Compare* 8 U.S.C.

§ 1231(b)(3)(B)(ii) *with id.* § 1158(b)(2)(A)(ii). Construction of the withholding provision moreover inevitably implicates directly the proper construction of the parallel asylum statute. *See supra* at 18 (explaining that asylum provision permitting Attorney General to designate particularly serious crimes demonstrates that such authority does not exist with respect to withholding of removal).

The plain language of the statute governing asylum limits "particularly serious crimes" to two categories: (1) aggravated felonies; and (2) crimes that the Attorney General has designated as "particularly serious" by regulation. Petitioner's export conviction does not fall into either of these categories. Pursuant to the *expressio unius* canon (*see supra* at 17-18), the Attorney General lacks authorization to designate crimes as particularly serious through other means. Thus, petitioner is eligible for asylum. The Fourth Circuit's contrary interpretation renders Section 1158(b)(2)(B)(ii)'s "by regulation" clause surplusage.

The structure of the statute moreover demonstrates that Congress intended the Attorney General to determine that certain offenses preclude asylum, in contrast to the individualized case-by-case judgment the Fourth Circuit approved in this case. There is a stark contrast between the provision governing withholding of removal, which authorizes the Attorney General to determine through case-by-case adjudication whether an alien's conviction is particularly serious, 8 U.S.C. § 1231(b)(3)(B), and the asylum provision, which directs the Attorney General to "designate by regulation offenses" that will be considered particularly serious, *id.* § 1158(b)(2)(B)(ii).

Congress's decision to specify by regulation the offenses that will be considered particularly serious makes sense in light of the difference between asylum and withholding. The withholding remedy is mandatory if a non-citizen meets the criteria and none of the exceptions apply. However, as Judge Berzon explained in *Delgado*, "[e]ven for aliens eligible for asylum, the Attorney General can exercise discretion not to grant asylum because of the alien's criminal record." Thus, "[t]he only reason to specify 'particularly serious crimes' for asylum eligibility purposes, consequently, is to provide for uniformity with regard to *categories* of crimes." 563 F.3d at 879 (Berzon, J., concurring in part and dissenting in part) (emphasis added).

In concluding that, for purposes of asylum, "particularly serious crimes" were not limited to aggravated felonies and those crimes that the Attorney General had designated by regulation, the Fourth Circuit relied heavily on Congress's use of the permissive word "may," rather than a more commanding "must," in Section 1158(b)(2)(B)(iii); thus, the panel concluded, Congress had left the method of designation to the Attorney General's discretion.

That interpretation misses the mark. In Section 1158(b)(2)(B)(iii), Congress used permissive language because the Attorney General is not required to designate additional crimes at all: the statute already defines a category of crimes – aggravated felonies – that are per se particularly serious for purposes of asylum. If the Attorney General so chooses, he "may" designate additional crimes as particularly serious. But the statute is not permissive with regard to the

method by which the Attorney General may do so; rather, it specifically provides that any designations by the Attorney General will occur "by regulation." *See, e.g., United States v. Interlink Sys.*, 984 F.2d 79, 82 (2d Cir. 1993) (concluding that the language "may obtain review" through a particular court did limit appellate review to that court, and the permissive "may" indicated only that review was not mandatory).

II. Certiorari Is Warranted To Determine Whether Withholding of Removal And Asylum Are Categorically Unavailable Without An Individualized Determination That The Individual Is A Danger To The Community.

Federal law provides that a non-citizen shall be ineligible for withholding of removal or asylum if the Attorney General determines that she, having been convicted of a "particularly serious crime," is a "danger to the community of the United States." 8 U.S.C. § 1231(b)(3)(B)(ii); *id.* § 1158(b)(2)(A)(ii). Consistent with the uniform view of the other courts of appeals to have considered the question, the Fourth Circuit held that under these provisions the fact that an individual has been convicted of a particularly serious crime means *ipso facto* that she is a danger to the community. Pet. App. 12a n.1.

1. Certiorari is warranted because the Fourth Circuit's decision conflicts with the decisions of other signatories to the Convention – whose opinions, this Court has recently reiterated, "are entitled to considerable weight." *Abbott v. Abbott*, 130 S. Ct. 1983, 1993 (2010) (citing *El Al Israel Airlines v. Tsui*

Yuan Tseng, 470 U.S. 392, 404 (1999)). Courts in Canada, Australia, and the United Kingdom have interpreted the Convention to require both a past conviction and a determination of prospective danger before a non-citizen is rendered ineligible for withholding. *See Pushpanathan v. Minister of Citizenship and Immigration*, [1998] 1 S.C.R. 982 ¶12 (Canadian Supreme Court explaining that the government must "make the added determination that the person poses a danger to the safety of the public or to the security of the country . . . to justify *refoulement*"); *In re Baias & Minister for Immigration, Local Government, and Ethnic Affairs* (1996) 43 A.L.D. 284 (Australian Appeals Tribunal reversing deportation order because non-citizen did not pose a future danger in spite of his conviction); *R v. Sec'y of State for Home Dep't*, [2006] EWHC 3513 (Eng. Q.B. 2006) (determining eligibility for withholding based on whether the alien was "convicted of a particularly serious crime *and* is a danger to the community").

This view is also supported by an equally telling consensus among experts on the Convention. The United Nations High Commissioner for Refugees has explained that "the requirement of constituting a danger to the community does not operate as a presumption arising out of a past conviction, but instead requires a separate assessment that is both individualized and prospective." Br. of United Nations High Commissioner for Refugees in Support of Petr. 18, *Ali v. Achim* (2007). Grahl-Madsen, upon whom this Court has relied before in interpreting the Convention, *see Cardoza-Fonseca*, 480 U.S. at 440 n.24, explains that "danger," as used in the provision,

"must mean a 'present or future danger,'" and that "[i]t is . . . not the acts the refugee has committed[] that warrant his expulsion, but these acts may serve as an indication as to the behaviour one may expect from him in the future." Commentary on the Refugee Convention 1951, at 139, *available at* http://www.unhcr.org/3d4ab5fb9.html (visited July 21, 2010); *see also id.* at 139-40 ("Because Article 33 (2) is concerned with the present and future more than with the past, it seems that the authorities in many cases ought to give a refugee fair warning and a chance to amend his ways, before expulsion to a country of persecution is seriously considered. It must be emphasized that Article 33(2) clearly calls for deciding each individual case on its merits."). While a past conviction therefore may provide evidence of future danger, it cannot replace danger as the grounds for ineligibility.

2. The court of appeals' ruling is unsustainable in light of the plain text of the statute. Whenever possible, this Court should interpret statutes such that "no clause, sentence, or word shall be superfluous, void or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). If Congress wished to render all non-citizens convicted of particularly serious crimes ineligible for withholding, there was no reason to include additional language directed to whether the individual is a "danger to the community."

The plain language of the statute also makes clear that whether a non-citizen is ineligible for withholding or asylum depends in part on whether she constitutes a *prospective* danger to the

community. The requirement that a non-citizen, "having been convicted of a particularly serious crime," *"is"* (withholding) or *"constitutes"* (asylum) a "danger to the community" cannot be satisfied by an analysis – like the Fourth Circuit's – which looks only to the non-citizen's past conduct. "Congress's use of a verb tense is significant in construing statutes." *Carr v. United States*, 130 S. Ct. 2229, 2236 (2010) (citing *United States v. Wilson*, 503 U.S. 329, 333 (1992)). Absent context-specific evidence to the contrary, "words used in the present tense include the future as well as the present," The Dictionary Act, 1 U.S.C. § 1; they do not, however, encompass past conduct, *see Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987) ("Congress could have phrased its requirement in language that looked to the past . . . but it did not choose this readily available option."). By contrast, other provisions of the withholding statute do deny eligibility based solely on a non-citizen's prior acts. *See, e.g.*, 8 U.S.C. § 1231(b)(3)(B)(iii) (non-citizen ineligible for withholding if she has "committed a serious nonpolitical crime outside the United States before [she] arrived in the United States").

This case shows why it is unreasonable to automatically assume that the commission of a "particularly serious crime" renders an individual a danger to the community. Petitioner's export conviction was not an aggravated felony, and she was sentenced to only a short jail term. The immigration judge, after making extensive factual findings, specifically determined that "the public interest would best be served by giving [petitioner] a chance to make good on her promise to redeem herself and

live a worthy future life. I believe that the respondent can and will achieve this potential." Pet. App. 100a-01a. Yet his grant of relief was reversed by the BIA, which expressly indicated that the immigration judge should have focused only on petitioner's underlying conviction, rather than whether she was likely to violate the law again. *Id.* 43a. Such a purely retrospective analysis cannot be reconciled with a statutory scheme that is designed to exclude those who constitute a present danger.

The Protocol strongly reinforces the conclusion that non-citizens are ineligible for withholding (and asylum) only if they have both been convicted of a particularly serious crime *and* constitute a present danger to the community. The language in federal law is not merely similar to that used in the Protocol; it replicates it exactly. *Compare* 8 U.S.C. § 1231(b)(3)(B) *with* Pet. App. 152a (Article 33 of the Protocol). Given Congress's use of language identical to that of the Protocol, and given the widespread understanding of the two-part inquiry required by the Protocol, *see supra* at 27-29, this provision should similarly be interpreted to require a separate finding of prospective danger before a non-citizen may be deemed ineligible for asylum.

III. This Case Is An Excellent Vehicle For Resolving Both Questions.

This case is an ideal vehicle to decide both of the questions presented. Petitioner squarely raised and preserved both of the questions presented at each level of review.

Further, the questions presented are outcome determinative in this case. If this Court agrees with

petitioner that, for purposes of withholding, a non-aggravated felony cannot be a "particularly serious crime," she will be eligible for relief; similarly, a holding that, for purposes of asylum, a non-aggravated felony can be a "particularly serious crime" only if the Attorney General has designated it as such by regulation would also render petitioner eligible for asylum.

Petitioner would also likely prevail on her claims for withholding and asylum if this Court were to hold that both the asylum and withholding provisions require a separate determination that the non-citizen is a danger to the community. In his opinion, Immigration Judge Schmidt determined that petitioner "seeks to enter the United States exclusively to care for her family and to support herself and her family through honest work"; moreover, as U.S. District Judge Ellis emphasized, "[a]t no time has the government, by counsel, in either [petitioner's] case or [her husband's] urged, argued, or stated that Ms. Gao posed a threat to national security." Pet. App. 111a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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